UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - A $20 GOLD COIN, KNOWN AS A 1933 "DOUBLE EAGLE" MINTED AT THE UNITED STATES MINT IN PHILADELPHIA, PENNSYLVANIA, Defendant-in-Rem.	:	96 Civ. 2527 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF CLAIMANT STEPHEN C. FENTON'S MOTION FOR SUMMARY JUDGMENT

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MEMORANDUM OF LAW IN SUPPORT OF CLAIMANT STEPHEN C. FENTON'S MOTION FOR SUMMARY JUDGMENT

Claimant Stephen C. Fenton respectfully submits this memorandum of law in support of his motion for summary judgment dismissing plaintiff's third amended forfeiture complaint.

PRELIMINARY STATEMENT

On the heels of abandoning its unprecedented attempt to prosecute criminally Mr. Fenton, a reputable and respected rare coin dealer, for seeking to sell a gold coin that is recognized throughout the numismatic community for its historical value, the government commenced this civil forfeiture proceeding in an attempt to salvage some gain from its extravagant undercover operation. The government's current strategy for divesting Mr. Fenton of his gold coin is equally doomed since based on the undisputed facts, and even drawing all

inferences in Plaintiff's favor, the government is unable to satisfy its burden of proof necessary for it to pursue the drastic remedy of forfeiture.

This in rem action was brought by the United States Government for forfeiture of a $20 gold coin minted by the United States in 1933. This 67 year old coin, known as a "Double Eagle,"[1] is owned by Mr. Fenton, who is a resident of London, England and the sole proprietor of Knightsbridge Coins, a company that specializes in the purchase and sale of rare coins. (See Declaration of Stephen C. Fenton ("Fenton Decl.") ¶ 1). The government instituted the since-forsaken criminal action and this forfeiture proceeding based on a theory that Mr. Fenton's 1933 Double Eagle was stolen from the United States Mint in Philadelphia (the "Philadelphia Mint") near the time it was coined. Recognizing that its claim that this coin was stolen from the Philadelphia Mint over 60 years ago is a thin reed upon which to rest any legal claim, the government has sought to buttress this theory with the claim that Mr. Fenton made a false statement to facilitate the importation of his 1933 Double Eagle.

Both of the government's theories of forfeiture collapse under their own weight, however, because (i) even under the government's theory that the 1933 Double Eagle was stolen near the time it was minted, Mr. Fenton's 1933 Double Eagle was not "stolen property" at the time it was imported by Mr. Fenton; and (ii) the statement regarding the 1933 Double Eagle that the government challenges was neither a knowingly false statement nor material.

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[1] In the parlance of the day, a $20 gold piece was known as a "double eagle," a $10 gold piece was known as an "eagle," a $5 gold piece was known as a "half eagle" and a $2.50 gold piece was known as a "quarter eagle." See Jersey City & Bergen R.R. Co. v. Morgan, 160 U.S. 288 (1895).

With respect to the government's stolen property claim, summary judgment must be granted in Mr. Fenton's favor for three reasons. First, it is undisputed that the government had regained possession of the allegedly "stolen" 1933 Double Eagle long before Mr. Fenton obtained it, which under well-established law means that the coin was not "stolen property" at the time it was purchased by Mr. Fenton. Second, it is equally undisputed that after recovering the 1933 Double Eagle, the government issued a license authorizing the coin's export and voluntarily relinquished the coin for that purpose. Third, the government authorized the private possession of all gold coins minted by the United States in a 1954 Treasury Order and the 1965 Coinage Act, and thereby abandoned any claims to ownership of such coins, including the 1933 Double Eagle.

With respect to the government's false statement claim, there is no genuine issue as to any material fact supporting this allegation. First, there can be no dispute that the customs broker who filed the boilerplate document that is the basis for the government's claim did so without informing Mr. Fenton and without knowledge of the document's inaccuracy. As a result, neither Mr. Fenton nor the customs broker made a knowingly false statement as the statute requires to establish a violation. Second, the generalized information contained in that boilerplate document was not material to any decision by the United States Customs Service ("United States Customs" or "Customs"), another element of the offense that must be proven before the government can seek to divest Mr. Fenton of his property.

PROCEDURAL BACKGROUND AND PLAINTIFF'S ALLEGATIONS

All of Plaintiff's claims relate to Mr. Fenton's possession and importation of a 1933 Double Eagle United States gold coin.

A. The Criminal Action

On February 8, 1996, Mr. Fenton and Jasper Parrino, a coin dealer based in Kansas City, Missouri, were arrested by the United States Secret Service (the "Secret Service") and charged with a single criminal offense, conspiracy to "embezzle, steal, purloin, and knowingly convert to their use and the use of another, and without authority, sell, convey and dispose of any record, voucher, money, and thing of value of the United States" in violation of 18 U.S.C. § 641. (See Criminal Compl. ¶¶ 2, 2a).[2] Specifically, the criminal complaint alleges that Mr. Fenton and Mr. Parrino negotiated the sale of Mr. Fenton's 1933 Double Eagle.

The criminal complaint provides the following description of the history of the 1933 Double Eagle:

> In 1933, the Philadelphia Mint of the United States Treasury minted approximately 409,000 "Double Eagle" gold coins with a $20 face value St. Gaudens mold. None of these coins were ever legally placed into circulation and all but a handful of them were melted down.

(Criminal Compl. ¶ 2c). The criminal complaint contains no other information regarding the 1933 Double Eagle nor any specific allegation that the 1933 Double Eagle belonging to Mr. Fenton, or any other 1933 Double Eagle, had been stolen from the Philadelphia Mint.

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[2] The criminal complaint is attached as Exh. A to the moving declaration of Barry H. Berke ("Berke Decl.").

The criminal complaint also describes an elaborate undercover operation orchestrated by the Secret Service that preceded the arrest of Mr. Fenton and Mr. Parrino. The criminal complaint relates that from November 1995 through January 1996, Mr. Parrino had discussions regarding the sale of a 1933 Double Eagle with another individual, who allegedly specializes in the sale of investment grade coins and who was working as a government informant (the "informant"). (Id. ¶ 2a). The criminal complaint further alleges that these discussions culminated with the informant and two Special Agents of the Secret Service, who pretended to be interested buyers of the 1933 Double Eagle, meeting with Mr. Parrino and Mr. Fenton at the Waldorf-Astoria Hotel in New York. (Id. ¶¶ 2h. 2i). Mr. Fenton had in his possession a 1933 Double Eagle.

On the date by which the government had to either present evidence at a preliminary hearing to establish probable cause that an offense had been committed or obtain an indictment or information pursuant to Federal Rules of Criminal Procedure 5(c) and 5.1(a), the government moved to dismiss the criminal complaints against Messrs. Fenton and Parrino.[3] No true bill was ever filed against either Mr. Fenton or Mr. Parrino.

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[3] The presentation date had been extended to April 10, 1996.

B. The Civil Forfeiture Action

1. The First Civil Forfeiture Complaint

On the day prior to the dismissal of the criminal complaint against Mr. Fenton, the government filed a complaint for forfeiture of Mr. Fenton's 1933 Double Eagle (the "forfeiture complaint").[4]

Like the criminal complaint, the forfeiture complaint includes the allegation that the 1933 Double Eagles "were never lawfully issued or put into circulation as money by the United States Treasury Department, and never became currency or legal tender of the United States." (Forfeiture Compl. ¶ 4). The few facts alleged in the forfeiture complaint regarding the minting and destruction of 1933 Double Eagles, however, differ from those alleged in the criminal complaint. Whereas the criminal complaint alleges that 409,000 Double Eagles were minted in 1933, the forfeiture complaint alleges that 445,500 Double Eagles were minted in 1933. In addition, the criminal complaint alleges that "a handful" of such coins were not "melted down," while the forfeiture complaint alleges that only two 1933 Double Eagles in the possession of the Smithsonian Institution were not "ordered reduced to bullion." (See Forfeiture Compl. ¶ 4).

Unlike the criminal complaint, the forfeiture complaint suggests a possible theory as to how Mr. Fenton's 1933 Double Eagle might have left the Philadelphia Mint in 1933: "Some of the coins were believed to have been removed from the Philadelphia Mint unlawfully." (Id.). The only other factual allegation contained in the forfeiture complaint relates to the

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4 The forfeiture complaint is attached as Exh. B to the Berke Decl.

significance of the 1933 Double Eagle to coin enthusiasts: "any extant 1933 "Double Eagle" $20 gold coin is considered within the numismatic community to be one of the rarest and most valuable United States coins." (Id.).

Lastly, while the forfeiture complaint concedes that Mr. Fenton did not conceal the fact that he was transporting valuable coins when he entered the United States on February 7, 1996, it alleges that in a document that was filed with United States Customs, Mr. Fenton made a knowingly false statement. The forfeiture complaint alleges that Jet Air Service, Inc. ("Jet Air"), a customs broker, filed various documents in connection with Mr. Fenton's entry. It identifies three documents submitted to Customs by Jet Air in connection with Mr. Fenton bringing in numerous coins, including his 1933 Double Eagle. The forfeiture complaint refers to a Customs Form 3461 "Entry/Immediate Delivery," which describes the merchandize as "U.S. & foreign gold coins," and an invoice from Knightsbridge Coins that accompanied the Form 3461, which describes the items with greater particularity as "72 gold and 3 silver United States coins, and 22 gold and 6 silver British and Australian coins valued at 477,000 [British Pounds] or $742,450.50 [United States dollars]." (Id. ¶ 13). In addition, the forfeiture complaint refers to a letter addressed to the United States Customs Service from Jet Air, which provides:

> The imported items were legal tender U.S. gold coins minted by the United States Government between 1830 and 1932. The coins are of various denominations; i.e. 20 dollar, 10 dollar, 5 dollar, 2 1/2 dollar. These were minted at various mints and are of various qualities and designs; i.e. Liberty, Independence, St. Gauden.

(Id. ¶ 14).

Based on these factual allegations, the forfeiture complaint avers that Mr. Fenton's 1933 Double Eagle is subject to forfeiture pursuant to 18 U.S.C. §§ 545,

981(a)(1)(C) and 1595a(c) because there is probable cause that (1) it was stolen property and Mr. Fenton imported the coin into the United States knowing that fact in violation of 18 U.S.C. § 2314 (the "stolen property claim") and (2) Mr. Fenton and/or Knightsbridge Coins imported Mr. Fenton's 1933 Double Eagle by means of a false declaration or statement made or caused to be made by them knowing the statement to be false in violation of 18 U.S.C. § 542 (the "false statement claim").

2. The Second, Third and Fourth Civil Forfeiture Complaints

At a pre-motion conference held on July 24, 1996, Mr. Fenton sought leave to file a motion to dismiss the forfeiture complaint on the grounds that the government did not satisfy its obligation under Rule E(2)(a) of the Supplemental Rules For Certain Admiralty and Maritime Claims to make a threshold factual showing of the legitimacy of its forfeiture claim.[5] At the conference, the Court instructed the government to amend its complaint to provide additional details regarding the basis for its forfeiture claim, and thereby obviate the need for such a motion. Thereafter, the government filed an amended complaint.

After Mr. Fenton objected to the amended complaint on the grounds that it failed to address the deficiencies in its original complaint, (see August 23, 1996 Letter from Mr. Berke to the Honorable John S. Martin, Jr., attached as Exh. C to the Berke Decl.), the government further clarified the basis for its forfeiture claim by letter dated August 26, 1996. (See August 26, 1996 Letter from Mr. Barr to the Honorable John S. Martin, Jr. Seeking Leave to File a

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5 See United States v. Daccarett, 6 F.3d 37, 47 (2d Cir. 1993) ("These standards are more stringent than the general pleading requirements set forth in the Federal Rules of Civil Procedure, an implicit accommodation to the drastic nature of the civil forfeiture remedy.") (citation omitted).

Second Amended Complaint, attached as Exh. D to the Berke Decl.). The government clarified its legal theory for seeking forfeiture of Mr. Fenton's 1933 Double Eagle based on its reinstituted stolen property claim. The government argued that (1) because the 1933 Double Eagle gold coins never became legal tender, any 1933 Double Eagle in private hands "must have been stolen from the Mint," and (2) Mr. Fenton's 1933 Double Eagle "was per se stolen from the Mint because it simply could not have been removed by any legal means." (See id. at 1).

In addition, the government sought leave to serve a second amended complaint that specified the statement alleged by the government to constitute the basis for its false statement claim under 18 U.S.C. § 542 (as had been requested by Mr. Fenton). (Id.). Specifically, the government's second amended complaint indicates that the false statement claim is based on its allegation that "Fenton claimed he was only importing coins minted between 1830 and 1932, even though he was in fact bringing a notoriously rare 1933 Double Eagle into the country." (Id. at 2). After the government filed its second amended complaint, the Court granted Mr. Fenton leave to raise his objections to the government's second amended complaint by motion for summary judgment as to both of the government's claims for forfeiture following discovery. (See August 23, 1996 Letter at 3 & 4 n.2 , attached as Exh. C to the Berke Decl.).

On January 28, 1999, the government again sought leave to amend its forfeiture complaint. Specifically, the government sought an in personam declaratory judgment against Mr. Fenton, pursuant to 28 U.S.C. § 2201, that the United States has good title to the 1933 Double Eagle and that Mr. Fenton has no title or other possessory claim. [6] At a conference on

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[6] The third amended forfeiture complaint is attached as Exh. E to the Berke Decl.

May 11, 1999, the Court granted the government's leave to amend, but stated that the declaratory judgment claim is in rem.[7] (See Relevant Excerpts of May 11, 1999 Tr. at 2-7, attached as Exh. F to the Berke Decl.).

STATEMENT OF FACTS

A. A Brief History of Mr. Fenton's 1933 Double Eagle

1. The Minting of the 1933 Double Eagle

The third amended forfeiture complaint alleges that 445,500 Double Eagles were minted in 1933. (Third Amended Forfeiture Compl. ¶ 4). While the government has not produced any original mint records reflecting the precise dates that the 1933 Double Eagles were minted, the government has produced a copy of a letter from the Superintendent of the Philadelphia Mint to the Director of the Mint that purports to reflect the dates that the 1933 Double Eagles were minted. (See March 21, 1944 Letter from the Superintendent to the Director of the Mint, attached as Exh. G to the Berke Decl.). The letter states that 100,000 Double Eagles (or $2,000,000) were minted in March, 1933; 200,000 Double Eagles (or $4,000,000) were produced in April, 1933; and 145,500 Double Eagles (or $2,910,000) were minted in May, 1933. (See id.). As a general matter, one 1933 Double Eagle cannot be distinguished physically from any other 1933 Double Eagle. (See March 7, 1996 Letter from George E. Hunter, Ph.D., Assistant Director for Process Control and Quality Assurance, U.S. Mint (noting that the coin

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7 Although the third amended forfeiture complaint now contains three claims with the addition of the declaratory judgment claim, this summary judgment motion is addressed to the stolen property claim and the false statement claim since if Mr. Fenton wins on these two claims, the government has necessarily failed to demonstrate its declaratory judgment claim for title of the 1933 Double Eagle.

seized from Mr. Fenton is virtually identical to the coins in the Smithsonian and was struck from the same die), attached as Exh. H to the Berke Decl.).

2. The Regulatory Provisions Restricting the Private Ownership of United States Gold Coins

In 1933, when President Franklin D. Roosevelt took the United States monetary system off the gold standard, the United States put in place a regulatory system governing the private possession of gold and gold coins. Various Presidential Proclamations, Executive Orders and Treasury Department directives restricted the use of gold coin as currency and prevented further issue of gold coins.

To stem the onrush of gold withdrawal during the Great Depression, President Roosevelt declared a "Bank Holiday" on March 6, 1933 and prohibited banks from paying out any gold coin. (See Presidential Proclamation No. 2039, 48 Stat. 1691 (1933), attached as Exh. I to the Berke Decl.).[8] On March 9, 1933, Congress passed a bill declaring a serious emergency and "approved and confirmed" all the actions taken by President Roosevelt in the days before. 48 Stat. 1, 12 U.S.C. § 95a. On April 5, 1933, President Roosevelt issued Executive Order 6102, which required the delivery to the United States of all gold coin (as well as other types of gold) with certain exceptions. (See Exec. Order No. 6102 (Apr. 5, 1933), attached as Exh. J to the Berke Decl.). One of these exceptions was for gold coin having a recognized special value to collectors of rare and unusual coins. (Id.). On April 20, 1933, Executive Order 6111 was issued,

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[8] President Roosevelt relied on the Trading with the Enemy Act of 1917, enacted during World War I, for legal support. Section 5(b) provided that the President may, through such rules and regulations as he may prescribe, regulate or prohibit "any transactions in foreign exchange, export or earmarkings of gold or silver coin or bullion or currency . . . by any person within the United States." 40 Stat. 415.

which prohibited the export of gold coin. (See Exec. Order No. 6111 (Apr. 20, 1933), attached as Exh. K to the Berke Decl.).

Executive Orders 6102 and 6111 were later revoked and replaced by Executive Order 6260, issued on August 28, 1933 (See Executive Order 6260 (Aug. 29, 1933), attached as Exh. L to the Berke Decl). Executive Order 6260 prohibited the issuance of gold coin as currency and forbade the possession or retention of any interest in any gold coin and provided for the return of such gold with certain exceptions. (See id. §§ 3, 5). These exceptions again included exemptions for the retention of gold coin of recognized special value and as the Secretary of the Treasury might otherwise permit by license. (Id.).

Section 6 of Executive Order 6260 regulated the export of gold coin. Section 6 stated that "no person shall earmark or export any gold coin, gold bullion, or gold certificates from the United States, except under license therefor issued by the Secretary of the Treasury pursuant to the provisions of this Order" and then provided the circumstances under which the Secretary of the Treasury, "in his discretion and subject to such regulations as he may prescribe" may issue such licenses. (Id. § 6). Section 6 was specifically amended by Executive Order 6556, issued on January 12, 1934, to include an additional subparagraph outlining another situation where the Secretary of the Treasury may issue a license to export gold coin. This subparagraph provided that the Secretary of the Treasury may issue a license authorizing

> (e) Through any agency that he may designate, the export of gold coin having a special recognized value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces, unless . . . .)

(See Exec. Order No. 6556 (Jan. 12, 1934), amending Exec. Order No. 6260, attached as Exh. M to the Berke Decl.) (parenthesis in original).

Pursuant to authority granted in Executive Order 6260, the Secretary of the Treasury issued several regulations over the next few months regarding the private possession of gold. On December 28, 1933 and January 12, 1934, the Secretary of the Treasury issued regulations requiring delivery to the United States of all gold coins, gold bullion and gold certificates except for licensed exceptions. (See Order of the Secretary of the Treasury, December 28, 1933, Requiring the Delivery of Gold Coin, Gold Bullion, and Gold Certificates to the Treasurer of the United States, attached as Exh. N to the Berke Decl.). However, once again, these regulations exempted "[g]old coin having a recognized special value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces)." Id. On January 30, 1934, Congress expressly approved, ratified and confirmed all the orders and regulations of President Roosevelt and the Secretary of the Treasury issued under 12 U.S.C. § 95a and other statutes by enacting the Gold Reserve Act of 1934, 48 Stat. 337, 12 U.S.C. § 213. The Gold Reserve Act prohibited coinage of gold and payments in gold but continued to allow retention of gold coins with recognized special value. See 12 U.S.C. § 213.

3. The King Farouk 1933 Double Eagle

a. The United States authorized King Farouk's possession and export of his 1933 Double Eagle

In the middle of this past century, King Farouk of Egypt was a voracious private collector of rare coins, and amassed a great collection of 19th and 20th Century coins from the United States, as well as the rest of the world. (See Introduction to The Palace Collections of Egypt Catalogue of The Highly Important and Extremely Valuable Collection of Coins and Medals, Sotheby & Co. Auction, attached as Exh. O to the Berke Decl.). In 1944, King Farouk sought a license to export a 1933 Double Eagle under the applicable export laws of the time. As

discussed above, those export laws provided that any private individual could lawfully possess and export any United States gold coin for which a license was issued by the United States Treasury. (See Exec. Order No. 6260, as amended; December 28, 1933 Order of the Secretary of the Treasury.

Specifically, pursuant to these provisions, the Royal Legation of Egypt physically provided a 1933 Double Eagle $20 gold coin to the United States Treasury, and sought permission to export it to Egypt. On February 25, 1944, the Director of the United States Mint, Nellie Taylor Ross,[9] then provided the King Farouk 1933 Double Eagle to the Curator of History of the United States National Museum (the Smithsonian Institution) and asked that it answer the following two questions regarding the coin:

> (1) Whether it was of recognized special value to collectors of rare and unusual coin immediately prior to the issuance of the Order of the Secretary of the Treasury of December 28, 1933, and has been of such special value at all times subsequent thereto; and
>
> (2) Whether it was of such special value immediately prior to the issuance of the Executive Order of April 5, 1933, and has been of such special value at all times since such date.

(See February 25, 1944 Letter from Director of the Mint, attached as Exh. Q to the Berke Decl.). That same day, the Curator of History examined the coin, answered both questions in the affirmative and returned the coin to the Treasury Department. (Id.). On March 6, 1944, the Associate Director of the Smithsonian Institution confirmed to Director Ross the numismatic status of the coin:

> Reference is made to the call at the office of the Division of History on February 26 by Mrs. W.D. Fales of your Bureau who submitted for examination a twenty-

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9 Nellie Taylor Ross had been the Director of the Mint since at least 1934. (See July 21, 1934 Letter from Director Ross, attached as Exh. P to the Berke Decl.).

> dollar United States gold coin which the Royal Legation of Egypt desires to export.
>
> In response to your inquiry as to the numismatic status of the coin, Mr. T.T. Belote, Curator of History, advises me that it was a recognized special value to collectors of rare and unusual coin immediately prior to December 28, 1933 and also immediately prior to April 5, 1933 and has been of such recognized special value at all times since the dates mentioned.

(See March 6, 1944 Letter to Director Ross, attached as Exh. R to the Berke Decl.).

On February 29, 1944, the Treasury Department issued License No. TGL-11-1709 authorizing the export of the 1933 Double Eagle to King Farouk. (See March 30, 1944 Memo from the Acting Director of the Mint to the Chief of the United States Secret Service, attached as Exh. S to the Berke Decl.). The Mint then physically returned the 1933 Double Eagle to the Royal Legation of Egypt to export the coin to King Farouk for his collection on March 11, 1994. (Id.).

b. The United States failed to timely seek the return of the coin

Within approximately one month of the issuance of a license authorizing the export of the 1933 Double Eagle to King Farouk, the Secret Service was informed that such a license had been issued. Following the issuance of the export license for the Farouk coin, the Secret Service seized 9 of the 10 1933 Double Eagles that the Secret Service determined were in private hands. (See December 3, 1953 Memorandum from Inspector Daniel to Chief of Secret Service, attached as Exh. T to the Berke Decl.). Between March 30, 1944 and December 3, 1953, however, the United States government took no action with regard to King Farouk's 1933 Double Eagle. (See id.). As of 1953, the Secret Service files "do not show that any attempt was ever made to recover the Farouk coin." (See id.). In fact, on April 28, 1945, the General Counsel of the Treasury Department at the time stated that "the coin held by King Farouk does

not in my opinion present a problem which this Department should consider at this time." (See January 15, 1954 Memo from Agent Whitaker to Chief of the Secret Service, attached as Exh. U to the Berke Decl.). Thereafter, in 1949, a letter was addressed by the Department of Treasury to the State Department asking for the return of the coin, but a decision was made that it would be "politically inadvisable" to ask for the return of the coin, so no such request was made. (See December 23, 1953 memo from Hugo A. Ranta to Mr. Neal, attached as Exh. V to the Berke Decl.).

Such a request was made many years later when it was reported that the coin was to be auctioned by Sotheby & Co. ("Sotheby"), but ironically only after the Secret Service concluded:

> To fail to do so might place the Secret Service in an embarrassing position should some collector within the limits of the United States purchase the coin and [the Secret Service] should attempt to recover it. [The Secret Service] would also be subject to criticism from the nine collectors whom we have previously dispossessed of their coins if we fail to attempt to recover the Farouk coin.

(See December 3, 1953 Memo from Inspector Daniel to Chief, attached as Exh. T to the Berke Decl.).

c. The Farouk specimen is the only 1933 Double Eagle believed to exist other than the two in the Smithsonian

The government consistently has taken the position that the Farouk 1933 Double Eagle is the only existing 1933 Double Eagle, other than the two specimens in the Smithsonian Institute. (See, e.g., Undated Letter from the Secretary of the Treasury to the Secretary of State ("[t]he one coin that was exported to Egypt remains outstanding and is believed to be the only one of its kind in the hands of the general public"), attached as Exh. W to the Berke Decl.;

December 3, 1953 Memo from Inspector Daniel to Chief, attached as Exh. T to the Berke Decl., ("it was determined that ten $20 gold coins (1933) were in the possession of various coin collectors," nine of which have been recovered); February 12, 1996 Draft Secret Service Press Release, attached as Exh. X to the Berke Decl., ("The 1933 Augustus Saint-Gaudens double eagle $20 gold coin recovered by the U.S. Secret Service on February 8, 1996 is believed to be the coin once owned by King Farouk. . . . After Secret Service agents researched U.S. Treasury Department records held in the National Archives, College Park, Maryland, and in the Washington Record Center, Suitland, Maryland, they believe that the coin Mr. Parrino spoke of is the 'King Farouk' coin.")).

d. The Auction of the Farouk Coin Collection

King Farouk ruled Egypt from 1936 to 1952 when he was overthrown during a military coup by General Gamal Abdal Nasser. (See History of Egypt, Encyclopedia Britannica, at 2). In February 1954, the new Egyptian government authorized Sotheby to hold an auction of the King Farouk coin collection. The coins being auctioned were described in a 300-page catalogue that was widely distributed. (See Introduction to The Palace Collections of Egypt Catalogue of The Highly Important and Extremely Valuable Collection of Coins and Medals, attached as Exh. O to the Berke Decl.). The auction comprised 2,798 lots of approximately 8,500 coins. (Id.). Sotheby characterized "the incomparable group of coins and medals described in this catalogue" as "rival[ing] the great sales of the past . . . . [that] will take its place in the bibliography of numismatics." (Id.).

Prior to the auction, the Farouk 1933 Double Eagle was withdrawn. (See May 11, 1954 Secret Service Memorandum from Harry H. Neal, attached as Exh. Y to the Berke Decl.).

The auction took place between February 24, 1954 and March 6, 1954. (See Introduction to The Palace Collections of Egypt Catalogue of The Highly Important and Extremely Valuable Collection of Coins and Medals, attached as Exh. O to the Berke Decl.).

4. Mr. Fenton's Purchase of the Farouk 1933 Double Eagle Gold Coin

On August 3 and 4, 1999, the government took the deposition of Mr. Fenton.[10] Mr. Fenton testified that he purchased the 1933 Double Eagle through a London-based rare coin dealer, Andre de Clermont, who in turn had obtained access to the coin from an Egyptian-based jeweler, . (See Fenton Dep. at 212-13, 226-27). Mr. Fenton explained that from 1933 through 1995, he had purchased coins from, and in partnership with, Mr. de Clermont that had come directly from the collection of King Farouk. (Id. at 213-17). Mr. Fenton further testified that Mr. de Clermont's source, , produced coins over time that were identical to coins described in the Sotheby catalogue of the Farouk collection, including the 1933 Double Eagle. (Id. at 217-28). Mr. Fenton stated that when Mr. de Clermont asked him if he was interested in purchasing the Farouk 1933 Double Eagle from in late-summer, 1995, Mr. Fenton had already purchased directly from Mr. de Clermont, as well as with Mr. de Clermont, many United States, British and other foreign coins and medals from the Farouk collection. (Id. at 217 44). Mr. Fenton also testified that he owned a copy of the Sotheby

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10 Excerpts of the August 3 and 4, 1999 deposition transcript of Mr. Fenton ("Fenton Dep.") are attached as Exh. Z to the Berke Decl. In light of the government's attempt to criminally prosecute Mr. Fenton for importing his 1933 Double Eagle and the government's refusal to commit that it would not reinstitute those charges, Mr. Fenton invoked his rights under the Fifth Amendment of the Constitution in response to questions regarding his attempted sale of the 1933 Double Eagle. See Ullmann v. United States, 350 U.S. 422, 427 (1956) (the Fifth Amendment privilege "serves as a protection to the innocent as well as to the guilty"). Mr. Fenton fully testified regarding the

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catalogue of the Farouk collection and had, in fact, matched up the coins he purchased with the description of the coins in the catalogue, including the 1933 Double Eagle. (Id. at 221). Mr. Fenton testified that he purchased the Farouk 1933 Double Eagle and a number of other less significant United States gold coins directly from for $220,000. (Id. at 254-55).

On January 18, 2000, Andre de Clermont was deposed in London by the plaintiff and counsel for Mr. Fenton.[11] Mr. de Clermont is a coin dealer with offices in London and Dubai, who has testified as an expert for the British government. (See de Clermont Dep. at 22-25). Mr. de Clermont testified extensively regarding the circumstances surrounding his purchase and sale of coins from the Farouk collection, and produced documents reflecting those transactions. Mr. de Clermont testified that in 1993, while he was working for Spink & Son Ltd., a London-based company that specializes in rare coins, he began purchasing coins from and his associate, , that had been part of the Farouk collection. (See id. at 47-57, 69-76). Mr. de Clermont explained that is a Egyptian-based jeweler, whose father had been the jeweler for the family of a former Egyptian Colonel, who had been a close associate of General Nassar. (Id. at 72-75). According to Mr. de Clermont, informed him that the Colonel had been a coin collector and had obtained a significant number of coins from the Farouk collection either by purchasing them at or after the auction, or being given them by General Nassar. (Id.). further informed Mr. de Clermont that the Colonel's children had inherited the collection and periodically were selling off portions of

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circumstances surrounding his purchase of his 1933 Double Eagle and his importation of the coin into the United States.

11 Excerpts of the January 18, 2000 deposition transcript of Andre de Clermont ("de Clermont Dep.") are attached as Exh. AA to the Berke Decl.

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their father's collection. (Id. at 72-73, 84). Mr. de Clermont also testified that knew the coins to be from the Farouk collection, and had seen the original coin envelopes from the Sotheby auction of the Farouk collection. (Id. at 85, 172-73). Mr. de Clermont produced handwritten notes he had taken while speaking with about certain coins that had become available to reflecting that they referred to the coins by referencing the lot numbers from the Farouk auction catalogue that described the same coins. (See id. at 225-26, 283-85, 343).

Mr. de Clermont further testified that he sold some of the Farouk coins directly to Mr. Fenton. (Id. at 90-94). In addition, he explained that because he didn't have sufficient capital to purchase the coins offered by , he entered into an arrangement with Mr. Fenton for many of the Farouk coins whereby Mr. Fenton put up the money to purchase the coins and they split the profits after the coins were sold. (Id. at 107, 131-43, 340-41).

During his testimony, Mr. de Clermont provided details regarding the coins and medals he purchased individually and in partnership with Mr. Fenton between late 1993 and 1995 that could be directly traced to the Farouk collection. (Id. at 287-333). Mr. de Clermont also produced his business' records reflecting his purchase and/or sale of these coins. (See de Clermont Dep. Exh. 2A, attached as Exh. BB to the Berke Decl.; de Clermont Dep. at 98). Mr. de Clermont further related that he had obtained a catalogue of the Sotheby auction of the Farouk collection that contained the handwritten notes of someone attending the auction referencing the coin dealers who purchased the coins actually sold at the auction. (Id. at 60-66, 82-83, 96-99; see also de Clermont Dep. Exh. 3 (excerpts of catalogue), attached as Exh. CC to the Berke Decl.). According to Mr. de Clermont, for virtually every coin that offered for sale

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to Mr. de Clermont, the marked catalogue contained no name next to the matching lot number describing that coin. (de Clermont Dep. at 285-86, 309). Mr. de Clermont interpreted this to mean that either those lots of coins were not sold at the auction, or were sold to someone locally who was not a well-known collector and thus was unknown to the attendee taking notes. (Id. at 62-66, 109-10). Mr. de Clermont was able to trace every coin he purchased from to a specific lot of coins described in the Sotheby catalogue. In preparation for his testimony, Mr. de Clermont created an annotated copy of his invoices reflecting his purchase or sale of coins from the Farouk collection by handwriting next to each Farouk coin he purchased or sold the lot number from the Farouk catalogue that contained the identical coin or group of coins. (See de Clermont Dep. Exh. 2A, attached as Exh. BB to the Berke Decl.; de Clermont Dep. at 116-17; 287-333).

The annotated list is a virtual rosetta stone showing the Farouk lineage of the coins Messrs. de Clermont and Fenton purchased from . Mr. de Clermont testified that it would be impossible for the coins produced by to have been obtained from any source other than the Farouk collection. (Id. at 283, 312-13, 317). Indeed, many of the coins provided by are extremely rare or unique coins that are described in detail in the Farouk catalogue. (Id. at 172-73). In addition, the coins purchased by Messrs de Clermont and Fenton from were grouped together in a manner that matched up nearly perfectly with the lots of coins from the Farouk auction catalogue. (Id. at 172-73, 282). Mr. de Clermont described how this grouping established that the coins being produced were from the Farouk collection:

> I could, which is the point of the lot numbers, continually cross-refer to be able to see that every single coin was producing could be met with the catalogue and the date

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> combinations of the coins meant that there would be no way anybody else in Egypt or any other source in Egypt would have a continuing run of these dates that matched the catalogue. It is not the single coin, it is the combination of a group of dates all coming in one. It became very apparent with the European, if you look at something like the Hamburg group [of coins], every single date in the lot, you could go through 100 European sales and not find all the Hamburg coins like that together. . . .
>
> And the completeness in some instances of the numbers in other words, where you got six coins and all six coins matched in the lot, it would be impossible to be any other source, especially considering the source they were coming from. There are cases of coins either described as "unique" or "virtually unique" which directly benchmark it. Further on there is a Roosevelt medal coming with the United Nations medal sold as one lot in the auction. Two of them are described as "unique" and never seen before. Then he turns up with the pair together. There is no other explanation than they came from Farouk.

(Id. at 172-73; see also id. at 282-83).

By comparing Mr. de Clermont's annotated invoice lists (De Clermont Dep. Exh. 2A) and Mr. de Clermont's Sotheby catalogue of the Farouk auction (De Clermont Dep. Exh. 3), it is possible to trace every coin purchased by Messrs. de Clermont and Fenton to the Farouk collection. Among these coins and medals are examples for which it is believed there is only one specimen. (See de Clermont Dep. at 300 (referring to "great rarities" which he purchased that "are only known to Farouk")). For example, a November 6, 1995 de Clermont invoice shows that Messrs. de Clermont and Fenton purchased 3 unique Brazilian gold bars. (See de Clermont Dep. Exh. 2A at 41, attached as Exh. BB to the Berke Decl.). Each gold bar produced by the Brazilian government had a unique number on it. (See de Clermont Dep. at 325-34). Messrs. de Clermont and Fenton sold the gold bars to UBS Bank, which placed the bars in a catalogue for sale in January 2000. (Id. at 216, 327). The UBS catalogue has pictures of the bars showing their dates and identification numbers to be (a) 1815 & N1876, (b) 1807 & N1968, and (c) 1811

& N121. (See de Clermont Dep. Exh. 5 at Lot No. 1619, 1550 and 1591, attached as Exh. DD to the Berke Decl.). The catalogue also specifically traced the lineage of the Brazilian gold bars, describing them as being "Ex Collection King Farouk of Egypt, Sotheby & Co., February 1954, Nos. 25, 16 and 18." Indeed, a review of the Sotheby catalogue of the Farouk auction at pages 10-11, Lots 16, 18 and 25, reveals the exact one-of-a-kind Brazilian gold bars, with the identical dates and identification numbers, as those purchased by Messrs. de Clermont and Fenton and identified in the UBS catalogue. (See de Clermont Dep. Exh. 3 at 10-11, Lots 16, 18 & 25, attached as Exh. CC to the Berke Decl.).

Similarly, a December 28, 1994 de Clermont sales confirmation reflects the purchase from of a 1883 U.S. Gilt Proof Pattern $5 Coin. (See de Clermont Dep. 2A at 10, attached as Exh. BB to the Berke Decl.; de Clermont Dep. at 301-333). In the Sotheby catalogue of the Farouk auction, this exact coin is described as "unpublished and probably unique." (See de Clermont Dep. Exh. 3 at 181, Lot 1939, attached as Exh. CC to the Berke Decl.; see also de Clermont Dep. at 301-333, attached as Exh. AA to the Berke Decl.). In addition, the May 24, 1995 invoice includes various medals described in the Farouk catalogue, including a Roosevelt and platinum United Nations medal. (See de Clermont Dep. Exh. 2A at 27, attached as Exh. BB to the Berke Decl.; de Clermont Dep. at 319-20). These two medals appear together in one lot in the Farouk auction catalogue and are described as "[b]oth in mint condition and both probably unique." (See de Clermont Dep. Exh. 3 at 145, Lot 1565, attached as Exh. CC to the Berke Decl.). As to these medals, Mr. de Clermont testified "in other words there is only one of each . . . .To have both of them to come together at the same time, that is from Farouk without any possibilities." (See de Clermont Dep. at 320-321; see also id. at 205

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(noting that Mr. Fenton still has the medals because he did not know how to value it since "[i]t is a unique item, there has never been one")).

In addition, many of the invoices have coins grouped together that identically replicate specific lots of coins from the Farouk auction. For example, a November 15, 1994 de Clermont invoice contains eight German coins of different years ranging from 1797 to 1833 that are an exact match with the coins in Lot 756 from the Farouk auction catalogue. (See de Clermont Dep. Exh. 2A & Exh. 3 at 21, Lot 756, attached as Exhs. BB and CC to the Berke Decl.; see also de Clermont Dep. at 298-99 ("Here is why I could not have any doubt whatsoever they are Farouk because these 8 coins exactly match the 8 coins in the sale . . . . the law of probability that could turn up with 8 German coins matching the lot from Farouk is impossible.")). Another such example is found in the January 26, 1995 invoice, which reflects five German coins between the years 1815 and 1856 that match up exactly to Lot 713 of the Farouk auction catalogue. (See de Clermont Dep. Exh. 2A at p. 13 & Exh. 3 at 71, Lot 713, attached as Exhs. BB and CC to the Berke Decl.; de Clermont Dep. at 306). Mr. de Clermont explained that among the coins described were "Piedforts," which are extremely rare, and the "combination of that with the other three coins specified by date, is such that the odds of being together are so infinitesimal that they have to be the same lot." (Id. at 307). As Mr. de Clermont stated:

> You also had the coincidence factor which seemed impossible when 6 or 8 coins all matched exactly the same description as a single lot, which in itself, even if it was not coming from Farouk, would be practically impossible. For it not to be Farouk therefore effectively was impossible. It had to be Farouk.

(Id. at 283).

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To assist the Court, a chart has been prepared showing the Farouk coins purchased by Messrs. de Clermont and Fenton, the date of the invoice reflecting the purchase, sale or ownership of each coin, the specific lot number from the Sotheby catalogue for the Farouk auction describing the same coin, and the page of de Clermont's deposition testimony where he testifies about that coin. (See Berke Decl., Exh. EE). The chart provides a simple road map linking the coins purchased by Messrs. de Clermont and Fenton from to the coins owned by King Farouk.

According to Mr. de Clermont, during the summer of 1995, he asked whether he knew if the family had in its possession a number of extremely rare coins that had belonged to King Farouk but had not been sold at the 1954 auction, including the 1933 Double Eagle gold coin. (See de Clermont Dep. at 228-31). Mr. de Clermont testified that after his inquiry, did produce the Farouk 1933 Double Eagle and offered to sell it to Mr. de Clermont. (Id. at 251-54). Mr. de Clermont stated that he then brokered the sale of the Farouk coin to Mr. Fenton, and Mr. Fenton paid approximately $220,000 for the Farouk 1933 Double Eagle and a number of other less significant United States gold coins. (Id. at 254-58).

B. Mr. Fenton's Importation of the 1933 Double Eagle

The customs broker who filed the necessary paperwork for Mr. Fenton to import his 1933 Double Eagle, Jet Air employee Larry Baker, testified that he was solely responsible for creating and filing the boilerplate document that is the basis for the government's allegations against Mr. Fenton — a one-page letter stating that the gold coins being imported were minted

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between the years 1830 and 1932.[12] (See Baker Dep. at 38; see also Baker Dep. Exh. 6, attached as Exh. GG to the Berke Decl.). In fact, Mr. Baker testified at his deposition in this action that the document containing the false statement was a standard boilerplate form that Mr. Baker created many years earlier in 1989, based on his own (mistaken) understanding of the time period during which all gold coins were minted by the United States. (Baker Dep. at 29-43, 52, 65-73).[13] Mr. Baker filed this form with the United States Customs on his own without his customers' participation. (Id.).

As Mr. Baker described, he created this form for the purpose of invoking a United States Customs' regulation that waives the merchandise processing fee if a receipt is filed for any U.S. goods imported from abroad. (Id. at 66-68). Since no actual receipts exist for United States gold coins, he created the one-page form at issue to serve as such a receipt when a customer imported gold coins minted in the United States. (Id. at 31). At the government's request, Mr. Baker even produced copies of identical forms that he had filed with the United States Customs on behalf of other Jet Air customers who imported gold coins. (Id. at 87-89). Mr. Baker further

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12 Mr. Baker testified that the United States government requires any commercial importer to use a customs broker. (See Excerpts of the January 9, 1997 deposition transcript of Larry Baker ("Baker Dep.") at 63-64, attached as Exh. FF to the Berke Decl.).

13 The boilerplate form provided:

> The imported items were legal tender U.S. gold coins minted by the United States Government between 1830 and 1932. The coins are of various denominations; i.e. 20 dollar, 10 dollar, 5 dollar, 2 1/2 dollar. These were minted at various mints and are of various qualities and designs; i.e. Liberty, Independence, St. Gauden.

(See Baker Dep. Exh. 6, attached as Exh. GG to the Berke Decl.).

testified that Jet Air provided these boilerplate merchandise forms directly to Customs without consulting with their customer prior to doing so. (Id. at 72-73).

Mr. Baker then explained that the only information he obtained from Mr. Fenton and his co-worker Jim Brown regarding the coins that they were importing in February, 1996 was the country of origin, the metal, the quantity and the approximate value or purchase price of the coins. (Id. at 74-76). Mr. Baker testified that United States Customs does not require any additional information to be provided, including the dates of the coins. (Id.). Since Mr. Baker was not required to provide the dates of the coins to be imported by Mr. Fenton to the United States Customs, Mr. Baker did not obtain this information. (Id. at 79-80). As a result, Mr. Baker did not know the dates of the coins that Mr. Fenton was importing. (Id.). Mr. Baker also testified that no representative of the government ever interviewed him regarding the document at issue prior to relying on the document in making the false statement claim against Mr. Fenton. (Id. at 83-84).

Similarly, Mr. Fenton testified and stated in his declaration that he had not seen the boilerplate merchandise form that Jet Air filed with United States Customs to avoid a merchandise fee until after his arrest. (See Fenton Dep. at 193-96; Fenton Decl. ¶ 6). Mr. Fenton further testified that upon seeing the document that referenced gold coins between the dates 1830 and 1932, he believed it to be a "strange document" because, among other reasons, he had not known about the document previously, he knew the United States government to have been making gold coins since 1795, the document did not reference other denominations known to exist such as one-dollar pieces and three-dollar pieces and it referenced a design of coin that did not exist during that time, an Independence gold coin. (Fenton Dep. at

194-96, 202). Mr. Fenton also confirmed that he was never asked to supply the dates of any coins he was importing by Mr. Baker or Jet Air. (See Fenton Dep. at 197; Fenton Decl. ¶¶ 3 & 4). In addition, Mr. Fenton testified that prior to importing the coins on February 7, 1996 that included the 1933 Double Eagle, he supplied Mr. Baker with a list of the coins he was importing that did not include their dates. (See Fenton Dep. at 199-200; Fenton Decl. ¶ 4; see also Baker Dep. Exh. 4, attached as Exh. HH to the Berke Decl.). Specifically, Mr. Fenton also testified and declared that he provided only the country of origin, the metal, the quantity and the approximate value of the coins. (See Fenton Dep. at 74-76; Fenton Decl. ¶ 4).

As Mr. Fenton further states in his declaration, he produced documents that show that he did not provide the dates of the coins he was importing on prior occasions in which he imported coins into the United States with the assistance of Jet Air. (See Fenton Decl., Exhs. A & B). In addition, Mr. Fenton declared that he had never seen the boilerplate form used by Jet Air prior to receiving the forfeiture complaint, nor did he know that Jet Air submitted a document of this type. (See Fenton Decl. ¶ 6). Mr. Fenton also produced the documents he received from Jet Air following the February, 1996 importation. These documents consisted of a Jet Air invoice for the services rendered, and a copy of the United States Customs Service entry form. (Fenton Decl. ¶ 5, Exh. ד). Mr. Fenton further stated that these are the same type of documents he received in the past when using Jet Air as a customs broker. (Fenton Decl. ¶ 5).

ARGUMENT

I.

SUMMARY JUDGMENT MUST BE GRANTED BECAUSE MR. FENTON'S 1933 DOUBLE EAGLE DOES NOT CONSTITUTE STOLEN PROPERTY UNDER THE NATIONAL STOLEN PROPERTY ACT

A. The Standards for Summary Judgment in a Civil Forfeiture Complaint

1. The Standard for Summary Judgment

Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. It is the nonmoving party's burden to "demonstrate to the court the existence of a genuine issue of material fact." Lendino v. Trans Union Credit Info. Co., 970 F.2d 1110, 1112 (2d Cir. 1992). "A fact is material when its resolution would 'affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" General Elec. Co. v. New York State Dep't of Labor, 936 F.2d 1448, 1452 (2d Cir. 1991) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Where undisputed material facts are properly placed before the court, "those facts will be deemed admitted unless they are properly controverted by the nonmoving party." Glazer v. Formica Corp., 964 F.2d 149, 154 (2d Cir. 1992). Although the movant bears the burden of showing that no factual dispute exists, to defeat summary judgment the non-movant must go beyond the pleadings and produce prima facie evidence supporting its claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323-26 (1986). As demonstrated below, plaintiff's complaint clearly fails to pass muster under this standard.

2. The Burden of Proof in a Civil Forfeiture Proceeding

The government bears the burden of establishing probable cause to believe that Mr. Fenton's 1933 Double Eagle gold coin is subject to forfeiture. United States v. Two Parcels of Property Located at 19 & 25 Castle St., 31 F.3d 35, 39 (2d Cir. 1994). To satisfy this burden, the government must show "reasonable grounds, more than mere suspicion, to believe that the property is subject to forfeiture." Gordon v. United States (In re Seizure of All Funds in Names Registry Publ'g, Inc.), 68 F.3d 577, 580 (2d Cir. 1995) (citing Marine Midland Bank, N.A. v. United States, 11 F.3d 1119, 1125 (2d Cir. 1993)). See also United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990). If the government meets this burden, the burden of proof shifts to Mr. Fenton to show by a preponderance of the evidence that his 1933 Double Eagle is not subject to forfeiture. United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 487 (2d Cir. 1995).[14] However, if the government is not able to meet its burden of establishing probable cause that Mr. Fenton's 1933 Double Eagle is subject to forfeiture, summary judgment must be granted for Mr. Fenton. See United States v. One Hundred & Thirty-Four Thousand, Seven Hundred & Fifty-Two Dollars United States Currency, More or Less, 706 F. Supp. 1075, 1082 (S.D.N.Y. 1989) (in granting claimant's

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14 The House of Representatives recently passed a bill that would change the burden of proof structure. Specifically, the bill states that

> In all suits or actions brought under any civil forfeiture statute for the civil forfeiture of any property, the burden of proof is on the United States Government to establish, by clear and convincing evidence, that the property is subject to forfeiture.

H.R. Doc. No. 1658, § 2, ¶ 5 (1999). On November 16, 1999, a similar bill was introduced in the Senate which also would shift the burden of proof, requiring Government to establish by a preponderance of the evidence that the property is subject to forfeiture. S. Doc. No. 1931, § 2 (1999).

motion for summary judgment, court stated that "in a forfeiture case, the claimant may properly test the existence of probable cause on a motion for summary judgment, so long as there is no genuine issue of material fact requiring trial"); United States v. One 1981 Cadillac Eldorado, 535 F. Supp. 65, 68 (N.D. Ill. 1982) (claimant's motion for summary judgment granted when government's showing was "not sufficient to pass the threshold of probable cause"); United States v. $37,590.00, 736 F. Supp. 1272, 1280 (S.D.N.Y. 1990) (granting claimant's motion to dismiss government's forfeiture complaint because evidence did not establish probable cause).

B. The Government Must Establish Probable Cause That Mr Fenton's 1933 Double Eagle Constitutes Stolen Property

The forfeiture complaint alleges a violation of 18 U.S.C. § 2314, the National Stolen Property Act ("NSPA"), which prohibits the importation of stolen merchandise known to be stolen. (Third Amended Forfeiture Compl. ¶ 28). To prove a violation of the NSPA, the government must show that property worth $5,000 or more was transported in interstate or foreign commerce by a person who knew that the property was "stolen, converted or taken by fraud." United States v. Turly, 352 U.S. 407 (1957). See also Dowling v. United States, 473 U.S. 207, 214 (1985); United States v. Wallach, 935 F.2d 445, 466 (2d Cir. 1991). Thus, to establish probable cause that Mr. Fenton's importation of his 1933 Double Eagle violated the NSPA, the government must show that the 1933 Double Eagle was "stolen" property at the time Mr. Fenton possessed it. See United States v. McClain, 545 F.2d 988, 1002 (5th Cir. 1977); see also Dowling, 473 U.S. at 214 (materials taken in violation of copyright do not constitute "stolen property" under the statue); United States v. Bennett, 665 F.2d 16 (2d Cir. 1981) (reversing conviction of owner for stealing scallop truck where defendant believed that owner consented for purpose of defrauding owner's insurer); United States v. Rogers, 786 F.2d 1000 (10th Cir. 1986)

(owner of airplane who took items from airplane after it was seized by government and under seal not guilty under NSPA since the government did not own the airplane); United States v. Long Cove Seafood, Inc., 582 F.2d 159, 162-63 (2d Cir. 1978) (defendants' taking of undersized clams did not make them guilty of illegally transporting stolen goods in violation of the NSPA since the government did not own the clams).[15]

In fact, the government cannot make such a showing that Mr. Fenton's 1933 Double Eagle was stolen property when seized since it is beyond dispute that (i) the government issued a license authorizing the export and possession of the 1933 Double Eagle; and (ii) the government had regained possession of the allegedly "stolen" 1933 Double Eagle long before Mr. Fenton obtained it, which under well-established law means that the coin was not "stolen property" at the time it was imported by Mr. Fenton. In addition, the government also relinquished its rights of ownership to all gold coins, including the 1933 Double Eagle in 1954, when the Treasury Department issued an order permitting the lawful ownership of all gold coins made prior to April 5, 1933 and in 1965, when the Coinage Act rendered all gold coins legal tender regardless of when they were coined or issued. Since Mr. Fenton's possession of the 1933 Double Eagle did not deny the government of any rights or benefits of ownership, the government cannot prove that his importation of the coin violated the NSPA.

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15 Although not relevant to this motion, the government must also prove that Mr. Fenton had the specific belief that his 1933 Double Eagle had been obtained by theft. United States v. Bennett, 665 F.2d 16, 22-23 (2d Cir. 1981) (defendant could not be convicted of NSPA if he believed that he was taking owner's truck as part of a scheme to defraud owner's insurer).

C. Fenton's 1933 Double Eagle Does Not Constitute Stolen Property Since The Government Issued a License Authorizing Its Private Possession and Voluntarily Provided The Coin to A Third-Party

It has been clearly established that the NSPA "should not be expanded at the government's will beyond the connotation — depriving an owner of its rights in property — conventionally called to mind." United States v. Rogers, 786 F.2d 1000, 1003 (10th Cir. 1986) (quoting United States v. McClain, 545 F.2d 988, 1002 (5th Cir. 1977)). As a result, this Circuit has recognized that "[b]ecause the concept of 'stolen' property requires an interference with the property rights of its owner, property that has been transported, sold, or otherwise disposed of, with the consent of the owner cannot be considered 'stolen' within the meaning of §§ 2312-2315." United States v. Bennett, 665 F.2d 16, 22 (2d Cir. 1981). See also United States v. Wallach, 935 F.2d 445, 466 (2d Cir. 1991) (quoting same language). Stated otherwise, because stealing is "essentially an offense against another person's proprietary or possessory interests in property . . . . the question whether a particular item is 'stolen' cannot be decided in a vacuum without considering whether there has been some sort of interference with a property interest." United States v. Long Cove Seafood, Inc., 582 F.2d 159, 163 (2d Cir. 1998).

While Mr. Fenton disputes the government's contention that the 1933 Double Eagle seized by the government was stolen from the Mint in the 1930s,[16] that issue is ultimately

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16 On the issue of whether the gold coin was stolen from the Philadelphia Mint in the 1930s, the forfeiture complaint sheds no light on whether the government intends to rely on any of the same factual allegations made in United States v. Barnard, 72 F. Supp. 531 (W.D. Tenn. 1947), a 1947 case upholding the government's seizure of a 1933 Double Eagle. In that case, the government alleged that the weight of the 1933 Double Eagles destroyed was the same as the weight of the 1933 Double Eagles minted and, therefore, the coin must have been stolen by an employee who replaced a 1933 Double Eagle with another coin of similar weight. Id. at 532-33. The holding was based on stipulated facts regarding virtually all of the issues, including the weights of the coins minted and

irrelevant since the government regained possession of the 1933 Double Eagle in the 1940s, which alone resolves the question of whether the coin was stolen property when possessed by Mr. Fenton. Moreover, the government's subsequent actions of voluntarily disposing of the 1933 Double Eagle by physically giving the coin to the Egyptian Legation and issuing a license authorizing the export and ownership of the coin leaves no doubt that the coin was not stolen property in the 1990s.

1. The Government Issued a License Authorizing the Private Possession of the 1933 Double Eagle

Without question, the export license issued by the government authorizes the private possession of the 1933 Double Eagle. In 1933, a regulatory system was put in place governing the private possession of gold and gold coins. Throughout all these Proclamations, Executive Orders and Treasury Department Directives and Orders restricting the ownership of gold coins, two provisions key to this case are continuously present. First, the Secretary of the Treasury and any agency he designated were empowered to grant licenses authorizing the holding of gold coin. Second, exceptions were made for gold coin having a recognized special value to collectors of rare and unusual coin.

a. The regulatory scheme governing the United States ownership of gold coins

As outlined in the "Statement of Facts," after President Roosevelt took office in March 1933, he declared a "Bank Holiday" and prohibited banks from paying out any gold coin.

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destroyed. Based on documents produced by the government during discovery and apparently not available to Mr. Barnard, Mr. Fenton disputes the stipulated facts upon which the opinion is based.

See Presidential Proclamation No. 2039, 48 Stat. 1691 (1933). On March 9, 1933, Congress passed a bill declaring a serious emergency and "approved and confirmed" all the actions taken by President Roosevelt in the days before. 48 Stat. 1, 12 U.S.C. § 95a.[17] On April 5, 1933, Executive Order 6102 was issued, which required the delivery to the United States of all gold coin (as well as other types of gold) except, inter alia, for gold coin having a recognized special value to collectors of rare and unusual coins. See Exec. Order No. 6102 (Apr. 5, 1933). On April 20, 1933, Executive Order 6111 was issued, which prohibited the export of gold coin. See Exec. Order 6111 (Apr. 20, 1933).

Executive Orders 6102 and 6111 were later revoked and replaced by Executive Order 6260, which contained the exemption allowing the retention of gold coin of recognized special value and as the Secretary of the Treasury might permit by license. (See Exec. Order 6260 (Aug. 28, 1933) §§ 3, 5, attached as Exh. L to the Berke Decl.).[18] Specifically, this Executive Order permitted (i) "that collectors of rare and unusual coin may acquire from one another and hold without necessity of holding a license therefor gold coin having a special recognized value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces, unless . . .)," id. § 3 (parenthesis in original), and (ii) the export of gold coin having a recognized value to collectors of rare and unusual coin for which any

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17. The power of Congress to enact this 1933 legislation was upheld in Campbell v. Chase Nat'l Bank, 5 F. Supp. 156 (S.D.N.Y. 1933), aff'd, 71 F.2d 669 (2d Cir. 1934).

18 Throughout the years, there have been several amendments to Executive Order 6260 until its revocation by Executive Order 11825, issued on December 31, 1974. Citations to Executive Order 6260 are to its text as it existed in 1944, when the government issued the export license to the Royal Legation of Egypt.

agency designated by the Secretary of the Treasury issued a license authorizing its export. See Exec. Order No. 6556 (Jan. 12, 1934), amending Executive Order 6260.

Furthermore, Executive Order 6260 provided that the Secretary of the Treasury may issue any regulations deemed necessary to carry out the provisions in Executive Order 6260. See United States v. Levy, 137 F.2d 778 (2d Cir. 1943). Pursuant to this authority, on December 28, 1933 and January 12, 1934, the Secretary of the Treasury issued regulations requiring delivery to the United States of all gold coins, gold bullion and gold certificates except for licensed exceptions. See Order of the Secretary of the Treasury, Requiring the Delivery of Gold Coin, Gold Bullion, and Gold Certificates to the Treasurer of the United States (Dec. 28, 1933). Id. However, once again, these regulations exempted "[g]old coin having a recognized special value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces)." Id. On January 30, 1934, Congress expressly approved, ratified and confirmed all the orders and regulations of President Roosevelt and the Secretary of the Treasury issued under 12 U.S.C. § 95a and other statutes by enacting the Gold Reserve Act of 1934, 48 Stat. 337, 12 U.S.C. § 213.

Thus, these Executive and Treasury Orders and Congressional legislation, which were intended to prevent the hoarding of gold, required all gold coins to be delivered to the United States Mint and prohibited the private possession of all gold coins, except, inter alia, those coins for which the Department of Treasury issued a license or were of recognized special value to collectors of rare and unusual coins. As a result, by January 30, 1934 while title to virtually all gold coins had passed to the United States, these two exceptions were specifically preserved. See United States v. Mock, 143 F. Supp. 661, 663 (N.D. Cal. 1956) (Gold Reserve

Act of 1934 "did not by legislative fiat obliterate all of the gold coins of the United States. The fact is that the right to own, possess and trade in gold coins under certain limited conditions has been carefully preserved and recognized at all times") (emphasis added).

b. The export license issued to the Royal Legation in 1944 authorized the lawful possession of the 1933 Double Eagle by King Farouk

The myriad Executive Orders and Treasury Department regulations following the restrictions placed on the ownership of gold in 1933 clearly authorized the lawful possession of gold coins for which a license had been issued. In various cases brought by the government under these provisions and the Gold Reserve Act, courts recognized the significance of such a license. See Nortz v. United States, 294 U.S. 317, 329 (1935) (in suit by owner of gold certificates against the United States, court held owner who relinquished his gold certificates pursuant to government regulations did not bring himself within any of the stated exceptions to receive gold coin in exchange since he did not hold a federal license to hold gold coin); United States v. Kushner, 135 F.2d 668, 670 (2d Cir. 1943) (Gold Reserve Act "applies only to importations in disregard of regulations or licenses of the Secretary of the Treasury"); United States v. Bates, 148 F.2d 907 (7th Cir. 1945) (reversing defendant's conviction since there was no proof of a conspiracy to acquire gold without a license).

As outlined above, Section 6 of Executive Order 6260, as specifically amended by Executive Order 6556, empowered the Secretary of the Treasury or a designated agency to issue a license authorizing "the export of gold coin having a special recognized value to collectors of rare and unusual coin." That is precisely the action the government took with respect to the Farouk 1933 Double Eagle. The following facts surrounding the government's issuance of such

an export license to the Royal Legation of Egypt are undisputed and are supported by Exhs. Q-S to the Berke Decl.:

- The Royal Legation of Egypt provided a 1933 Double Eagle gold coin to the Treasury Department so that the coin could be exported from the United States.
- Upon receiving this request, the Treasury Department forwarded the coin to the Curator of History at the United States National Museum (Smithsonian) to ascertain whether the coin met certain requirements for which an export license could be issued.
- The Treasury Department request tracked the language contained in Executive Order 6260 and asked whether the coin "was of recognized special value to collectors of rare and unusual coin."
- The Curator of History at the United States National Museum responded to the Treasury Department's inquiries by answering affirmatively to their questions regarding this issue.
- The Treasury Department issued an export license (TGL-11-170) for the export of the 1933 Double Eagle gold coin.

See Infra at pp. 13-15. These facts conclusively demonstrate that King Farouk received a valid license to export a 1933 Double Eagle gold coin from the Treasury Department, which was authorized to issue such licenses. As a result, King Farouk lawfully possessed this coin.[19]

In United States v. McClain, 545 F.2d 988, 1002 (5th Cir. 1977), where the Court reversed convictions under the NSPA for the importation of artifacts for which Mexico declared ownership. this issue was discussed. Under the Mexican law at issue, pre-Columbian artifacts recovered from Mexico were deemed to be the property of Mexico, except where the government of Mexico had granted a license or permit to a private person to export such

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19 There are no restrictions in these regulations prohibiting the owner of a gold coin who is issued an export license from selling, or otherwise disposing of, that coin upon its exportation.

artifacts. Id. at 993. Although given the obviousness of the point it was not subject to much discussion, the Court assumed that any artifact for which such a license or permit had been granted was not stolen property under the NSPA. Id. at 997, 1000, 1002. Similarly, in 1972, the United States Congress passed a law authorizing the forfeiture of any pre-Columbian monumental or architectural sculpture or mural imported into the United States. See 19 U.S.C. §§ 2091-2095. Once again, not surprisingly, Congress exempted from forfeiture any such artifact for which the country of origin issued a certificate or license authorizing its exportation. See 19 U.S.C. § 2091.

It is axiomatic that the NSPA cannot be violated unless there is in fact a stolen good involved in a transaction See United States v. Rose, 590 F.2d 232, 235 (7th Cir. 1978); 66 Am. Jur. 2d Receiving and Transporting Stolen Property § 44 (1999); see also People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906) ("[I]t is a mere truism that there can be no receiving of stolen goods which have not been stolen; [i]t is equally difficult to perceive how there can be an attempt to receive stolen goods knowing them to have been stolen, when they have not been stolen in fact.") (citation omitted). Since the government authorized the private ownership of the 1933 Double Eagle by issuing an export license, the property was not "stolen" and therefore is not subject to forfeiture under the NSPA.

2. The Government Regained Possession of the 1933 Double Eagle And Therefore Cannot Claim That It Is Stolen Property

In addition to the government having issued an export license for the Farouk 1933 Double Eagle, the fact that the government regained possession of the 1933 Double Eagle alone establishes that the coin could not have been stolen property at the time it was possessed by Mr. Fenton. Courts routinely have applied the common law rule that "goods [lose] their stolen

character immediately upon being recovered by the owner or his agent." United States v. Monasterski, 567 F.2d 677, 681 (6th Cir. 1977). See United States v. Warshawsky, 818 F. Supp. 181, 186 (E.D. Mich. 1993) (holding that "once government agents obtain actual, physical possession over stolen property, then it has been 'recovered' under Monasterski and the common law rule"), aff'd in part, rev'd in part on other grounds, 20 F.3d 204 (6th Cir. 1994); United States v. Cawley, 255 F.2d 338, 340 (3d Cir. 1958) ("The government agrees, as indeed it must, that it is a legal principle of long standing that when stolen goods are recovered by the owner or his agent before they are sold, the goods are no longer to be considered stolen, and the purchaser cannot be convicted of receiving stolen goods."); State v. Hageman, 296 S.E.2d 433, 439 (N.C. 1982) ("The weight of authority is that once stolen property is recovered, it loses its status as stolen property."). As a result, even assuming arguendo that the 1933 Double Eagle was "stolen" in the 1930s, the coin lost its "stolen character" when the government regained possession of it in 1944.

In Monasterski, a defendant convicted of possessing stolen goods from an interstate shipment in violation of 18 U.S.C. § 659 appealed, arguing that the goods had lost their status as stolen goods, when he possessed them. 567 F.2d at 678. The Sixth Circuit agreed and reversed the conviction since the goods, which had been placed under police surveillance, had lost their status as stolen goods. Id. at 679-84. The Court relied on the common law rule dating back to nineteenth century England that "one cannot be convicted of receiving stolen goods if, before the stolen goods reached the would-be receiver, the goods had been recovered by their owner or his agent." Id. at 679. The Court then outlined the other federal appellate cases to consider the issue, all of which had recognized the validity of the common law rule. Id. at 680

(citing Copertino v. United States, 256 F. 519 (3d Cir. 1919), United States v. Cohen, 274 F. 596 (3d Cir. 1921) and Cawley, 255 F.2d at 338). The Court concluded:

> Just as did the judges of nineteenth century England, we do not believe the words "stolen goods" include goods that were stolen but recovered by their owner or his agent. All would agree that at some point in time the goods in this case ceased being stolen goods. . . . We feel the best and only workable rule is the common law rule viz, the goods lost their stolen character immediately upon being recovered by the owner or his agent.

567 F.2d at 681. The Court further noted that its conclusion was consistent with the rule of statutory construction that "statutes are to be interpreted with reference to the common law and generally be given their common law meaning absent some indication to the contrary." Id. at 682. See Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952). The Second Circuit has similarly recognized this long-established principle that one cannot be found to have possessed stolen goods "if, before the stolen goods reached the receiver, the goods had been recovered by their owner or his agent." United States v. Muzii, 676 F.2d 919, 923 (2d Cir. 1982) (recognizing the validity of the common law rule while holding that where law enforcement merely conducts surveillance of stolen goods, the owner of the stolen goods did not have actual or constructive possession of the goods). See also United States v. Golomb, 811 F.2d 787, 792-93 (2d Cir. 1987) (quoting the same language in reversing conviction where allegedly "stolen" treasury checks were actually "bait" checks used by government agents).

It is undisputed that in 1944, the government physically possessed the 1933 Double Eagle, and determined that the coin could be exported to Egypt. Consequently, the 1933 Double Eagle could not be considered stolen property after 1944 when the government voluntarily gave possession of it to a third-party.

3. Mr. Fenton's 1933 Double Eagle is Not Stolen Property Since It Is the Farouk Coin and, In Any Event, the Government Cannot Distinguish the Farouk Specimen From Any Other 1933 Double Eagle that May Theoretically Exist

The government cannot establish probable cause that the 1933 Double Eagle owned by Mr. Fenton was not the same coin that was possessed by the government and exported to King Farouk in 1944. First, it has been clearly shown that Mr. Fenton actually obtained his 1933 Double Eagle from the Farouk collection. Second, the government cannot prove that any other 1933 Double Eagle exists, especially since it has consistently taken the position that the Farouk 1933 Double Eagle is the only 1933 Double Eagle that was in private hands at the time it was seized. Third, the government cannot physically distinguish the Farouk 1933 Double Eagle from any other specimen of the coin.

For nearly a two-year period preceding his purchase of the 1933 Double Eagle, Messrs. Fenton and de Clermont were purchasing coins from the Farouk collection that were clearly specified lots directly traceable to the Sotheby auction of the King Farouk collection in 1954. Among the coins purchased by Messrs. de Clermont and Fenton were one-of-a-kind coins and medals from the Farouk collection, as well as sets of coins that matched perfectly with specific lots of coins in the Sotheby's auction catalogue that only could have been obtained from the Farouk collection. See Infra at pp. 18 to 25. The chart comparing the coins obtained by Messrs. de Clermont and Fenton from with the identical coins and groups of coins described in the auction catalogue for the Farouk collection serves as vivid proof that the coins purchased by Messrs. de Clermont and Fenton, including the 1933 Double Eagle, are from the Farouk collection. (See Berke Decl., Exh.EE). Mr. de Clermont also presented evidence regarding the circumstances surrounding his gaining access to the Egyptian family that had

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obtained the coins directly from the Farouk collection. When Mr. de Clermont inquired about other rare coins listed in the auction catalogue for the Farouk collection but not sold at the auction, including the 1933 Double Eagle, produced the 1933 Double Eagle from the collection. The government cannot seriously contest that the coin possessed by Mr. Fenton is the Farouk specimen.

In addition, the only 1933 Double Eagle believed to exist, other than the two in the Smithsonian Institute, is the Farouk coin. In fact, the government itself has taken this position since at least 1953. At that time, it was represented at the highest levels of government that the 1933 Double Eagle once owned by King Farouk "is believed to be the only one of its kind in the hands of the general public." (Undated letter from the Secretary of the Treasury to the Secretary of State, attached as Exh. W to the Berke Decl.; see also December 3, 1953 Memo from Inspector Daniel to Chief, attached as Exh. T to the Berke Decl., ("it was determined that ten $20 gold coins (1933) were in the possession of various coin collectors," nine of which have been recovered); February 12, 1996 Draft Secret Service Press Release, attached as Exh. X to the Berke Decl. ("The 1933 Augustus Saint-Gaudens double eagle $20 gold coin recovered by the U.S. Secret Service on February 8, 1996 is believed to be the coin once owned by King Farouk. . . . After Secret Service agents researched U.S. Treasury Department records held in the National Archives, College Park, Maryland, and in the Washington Record Center, Suitland, Maryland, they believe that the coin Mr. Parrino spoke of is the 'King Farouk' coin.")). The government simply cannot prove that any other 1933 Double Eagle exists, let alone that Mr. Fenton's coin is such a non-Farouk specimen.

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In any event, a Farouk 1933 Double Eagle cannot be distinguishable from any other 1933 Double Eagle that may theoretically exist. In 1996, George Hunter, Ph.D., Assistant Director for Process Control and Quality Assurance in the U.S. Mint, physically compared Mr. Fenton's 1933 Double Eagle with the two specimens in the Smithsonian. He was able to determine the authenticity of Mr. Fenton's coin because it was struck from the same die as the Smithsonian coins. (See March 7, 1996 letter from Dr. Hunter, attached as Exh. H to the Berke Decl.). As a result, the 1933 Double Eagle seized from Mr. Fenton had the identical characteristics as the Smithsonian specimens, and presumably the Farouk specimens. (See id.). While this case presents the unusual circumstance of Mr. Fenton being able to trace the pedigree of his coin to that owned by King Farouk, the government cannot otherwise distinguish one 1933 Double Eagle from another (speaking theoretically, of course, since the only 1933 Double Eagles believed to exist are the Farouk and Smithsonian specimens).

As a result, the government cannot establish probable cause that Mr. Fenton's 1933 Double Eagle constitutes stolen property under the NSPA because it has to prove not only that the Double Eagle was stolen in the 1930s, but also that it was not the Farouk 1933 Double Eagle. Putting aside that the government cannot meet this latter burden because Mr. Fenton's 1933 Double Eagle does trace its lineage to the Farouk collection, even if that were not the case, the government can offer no facts to prove (a) that any other specimen of the 1933 Double Eagle existed in private hands and (b) that Mr. Fenton's 1933 Double Eagle is such a non-Farouk specimen.

Accordingly, Mr. Fenton's importation of his 1933 Double Eagle cannot be a violation of the NSPA since it was not stolen property at the time he imported it.

D. The United States Has Authorized the Private Possession of All Gold Coins, Including the 1933 Double Eagle

The various Executive and Treasury Orders and Congressional legislation issued and enacted, required all gold coins to be delivered to the United States Mint and prohibited the private possession of all gold coins, except, inter alia, those coins for which the Department of Treasury issued a license or were of recognized special value to collectors of rare and unusual coins. As a result, by January 30, 1934, title to all gold coins had passed to the United States, except those falling under the few exceptions. See 12 U.S.C. § 213. Anyone who possessed such a gold coin after January 30, 1934, therefore, could have been prosecuted for possessing government property under the Gold Reserve Act, or a number of other statutes, including the NSPA. See United States v. McClain, 593 F.2d 658, 664-65 (5th Cir. 1979 ("McClain II") (an object is considered stolen under the NSPA if a country has assumed ownership of it through the passage of legislation); United States v. Hollinshead, 495 F.2d 1154, 1155-56 (9th Cir. 1974). Similarly, all gold coins, except those of recognized special value in 1933, those for which a licensed was issued or those falling under one of the other narrow exceptions belonged to the United States government and were subject to seizure. See United States v. McClain, 545 F.2d 988, 1002-03 (5th Cir. 1977) ("[T]he state comes to own property . . . . when it declares itself the owner; the declaration is an attribute of sovereignty.").

In 1954, the Treasury Department took action to remove any ambiguity regarding the status of coins minted before or contemporaneous with the imposition of the above regulatory scheme that were of interest to collectors of rare and unusual coins. That order authorized the private possession of all gold coins minted before April 5, 1933, including the 1933 Double

Eagle. Similarly, while the government argues that the 1933 Double Eagle gold coins never became legal tender, the 1965 Coinage Act rendered all United States gold coin legal tender.

1. In 1954, The Treasury Department Issued An Order Permitting The Private Ownership Of All Gold Coins

The government has utterly failed to account for a Treasury Department Order that ended any controversy regarding ownership of virtually all gold coins minted by the United States, including the 1933 Double Eagle.

In 1954, the Treasury Department amended its earlier December 28, 1933 Order to permit the lawful ownership of all gold coins made prior to April 5, 1933 in recognition that such coins have great historical value for the numismatic community. See 19 Fed. Reg. 135 (1954) ("1954 Treasury Order"), attached as Exh. II to the Berke Decl. Specifically, the 1954 Treasury Order amends paragraph B of section 1 of the December 28, 1933 Treasury Order which had "require[d] every person subject to the jurisdiction of the United States forthwith to pay and deliver to the Treasurer of the United States all gold coin, gold bullion, and gold certificates situated in the United States, owned by such person, except as follows . . . (b) Gold coin having a recognized special value to collectors of rare and unusual coin (but not including quarter eagles, otherwise known as $2.50 pieces)." (See Order of the Secretary of the Treasury, December 28, 1933). The 1954 Treasury Order changes this language to read: ... "[g]old coin having a recognized special value to collectors of rare and unusual coin, including all gold coin made prior to April 5, 1933." (See 1954 Treasury Order, Amending ¶ B of § 1) (emphasis added). The government has not alleged, nor could it ever prove, that Mr. Fenton's 1933 Double Eagle was "made" after April 5, 1933. To the contrary, the documents produced by the government show that the government began minting 1933 Double Eagle gold coins in March,

1933. (See March 21, 1994 Letter from the Superintendent to the Director of the Mint (noting that 100,000 Double Eagles were minted in March, 1933 and 200,000 Double Eagles were produced in April, 1933), attached as Exh. G to the Berke Decl.).

Collectors of rare and unusual coins successfully lobbied the government to take into account their interest in passing the various pronouncements dating back to the original orders limiting the ownership of gold in 1933. The rules and orders go a long way to protecting the rights of collectors and coin dealers by insuring that all "rare and unusual coins" having value to collectors are, in fact, legal to own. See United States v. Mock, 143 F. Supp. 661 (N.D. Cal. 1956). To that end, the language of the 1954 Treasury Order leaves no doubt as to its sweeping effect, transferring ownership of any United States gold coin "made" prior to April 5, 1933 from the United States to any private individual possessing such a coin. The obvious purpose of the Order was to serve the interests of the numismatic community by removing all questions as to the legality of owning those coins of greatest interest to collectors and dealers. By the government's own admission, the 1933 Double Eagle is such a rare and unusual coin having recognized special value in the numismatic community. (See Third Amended Forfeiture Compl. ¶ 11).

Thus, by the terms of this provision, if Mr. Fenton's 1933 Double Eagle was "made" prior to April 5, 1933, the government has renounced any ownership interest in the coin and bestowed it upon the private individual possessing the coin, regardless of the coin's status in 1933. Since the government cannot prove that Mr. Fenton's 1933 Double Eagle was made subsequent to April 5, 1933, the government cannot establish probable cause that it maintained

an ownership interest in Mr. Fenton's 1933 Double Eagle following its issuance of this Treasury Order in 1954.

2. In 1965, Congress Passed Legislation Reaffirming That The 1933 Double Eagle Is Legal Tender

In its forfeiture complaint, the government has wrongly claimed that 1933 Double Eagles "never became currency or legal tender of the United States and therefore remained the property of the United States Government at all times." (Third Amended Forfeiture Compl. ¶ 8). This contention is belied by legislation subsequently passed by Congress. In 1965, the Coinage Act was enacted and made all coins and currencies of the United States official legal tender "regardless of when coined or issued." (Coinage Act of 1965, § 102 (July 23, 1965) (emphasis added), attached as Exh. JJ to the Berke Decl.). For our purposes, it is quite meaningful that the statute is phrased in the disjunctive, "coined or issued," as opposed to the conjunctive, "coined and issued," since the 1933 Double Eagles were clearly coined. See U.S. Customs Serv., Region II v. Federal Labor Relations Auth., 739 F.2d 829, 832 (2d Cir. 1984) ("When 'or' is inserted between two clauses, the clauses are treated disjunctively rather than conjunctively."); Brown v. Budget Rent-A-Car Sys., Inc., 119 F.3d 922, 924 (11th Cir. 1997) ("As 'a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Hence, language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause.'") (quoting Quindlen v. Prudential Ins. Co. of Am., 482 F.2d 876, 878 (5th Cir. 1973)); Towers v. United States (In re Pacific-Atlantic Trading Co.), 64 F.3d 1292, 1302 (9th Cir. 1995) ("In construing a statute, a court should interpret subsections written in the disjunctive as setting out separate and distinct alternatives."); United States v. Wilson, 41 F.3d 399, 401 (8th Cir. 1994) (rejecting defendant's

interpretation of statute that treated the disjunctive "or" as an "and"; "[t]erms connected by 'or,' however, normally are read to have separate meanings and significance").[20]

As a result, Congress authorized the private ownership and, indeed, use as legal tender, of all gold coins made by the United States. Since the government concedes that Mr. Fenton's 1933 Double Eagle was made by the United States, it is legal tender and therefore, as a matter of law, not illegal to possess.

In sum, there is no material fact at issue regarding (i) the Treasury Department's issuance of an Order authorizing the private possession of a class of gold coins that includes the 1933 Double Eagle; and (ii) Congress' passage of legislation that renders the 1933 Double Eagle legal tender and lawful to possess. As a result, these provisions provide additional reasons the government cannot establish probable cause that Mr. Fenton's 1933 Double Eagle constituted stolen property belonging to the United States in 1996 when Mr. Fenton possessed the coin.

II.

SUMMARY JUDGMENT MUST BE GRANTED BECAUSE MR. FENTON'S 1933 DOUBLE EAGLE WAS NOT IMPORTED BY MEANS OF A KNOWINGLY FALSE STATEMENT IN VIOLATION OF 18 U.S.C. SECTION 542

Following the dismissal of its unprecedented and errant criminal charges against Mr. Fenton, the government made new allegations against Mr. Fenton in an attempt to retain possession of his 1933 Double Eagle — namely, that he made a false statement regarding the

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20 See also Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) (Kennedy, J.) (the controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written); Demarest v. Manspeaker, 498 U.S. 184, 190 (1991) (Rehnquist, C.J.) (unanimous decision) ("When we find the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances.").

coin to facilitate its importation. As was established during discovery, however, this claim has on basis in fact.

To establish a violation of § 542, the government must offer proof that an individual (1) attempted to import merchandise into the United States (2) by means of a statement (3) without reasonable cause to believe the truth of such statement. United States v. Avelino, 967 F.2d 815, 817 (2d Cir. 1992). The false statement must have been made knowingly. Id. In addition, § 542 has a materiality requirement because the importation must be "by means of [the] false statement." Id.

A. The Government Must Prove That Mr. Fenton Knowingly Made A False Statement

It is a requirement of § 542 that a defendant make a false statement "without reasonable cause to believe the truth of such statement." 18 U.S.C. § 542. The government therefore is required to demonstrate that the defendant knowingly made a false statement. See United States v. Ven-Fuel, Inc., 602 F.2d 747, 753 (5th Cir. 1979) (requiring government under § 542 to show that the defendant "knew the statement was false"); United States v. Steinfels, 753 F.2d 373, 377 (5th Cir. 1985) (in order to secure a conviction under § 542, government must prove "the defendant made a false statement . . . he knew to be false"); (see also Third Amended Forfeiture Compl. ¶ 27 (alleging that the false statement was made "without reasonable cause to believe the truth of such statement, and by the procuring of the making of an such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement")).

Similarly, courts analyzing the requisite knowledge needed under 18 U.S.C. § 1001, which covers false statements made to United States departments or agencies,[21] have required proof of a specific intent to make a false statement. See United States v. Heuer, 4 F.3d 723, 732 (9th Cir. 1993) (specific intent requires that the "defendant act 'deliberately and with knowledge'") (citations omitted); see also United States v. Yermian, 468 U.S. 63, 69-70 (1984) ("[Section] 1001 requires that the Government prove that false statements were made knowingly and willfully."); United States v. Rodriguez-Rios, 14 F.3d 1040, 1048 (5th Cir. 1994) (same); United States v. Curran, 20 F.3d 560, 567 (3d Cir. 1994) (same); Bridget Fitzpatrick & John Torraco, False Statements, 36 Am. Crim. L. Rev. 607, 615 (1999) ("Knowing and willful intent to make a false statement is a necessary element of a § 1001 violation.") (footnote omitted).

Here, the government has not, and cannot, offer any proof that Mr. Fenton, Knightsbridge Coins, Jet Air or Mr. Baker had the requisite intent to violate § 542. The Customs broker who filed the necessary paperwork for Mr. Fenton to import his 1933 Double Eagle, Jet Air employee Larry Baker, was solely responsible for creating and filing the document that is the basis for the government's allegations against Mr. Fenton — a one-page letter stating that the gold coins being imported were minted between the years 1830 and 1932. (See Baker Dep. at 38). In fact, Mr. Baker testified at his deposition in this action that the document containing the false statement was a standard boilerplate form that Mr. Baker created many years earlier, in 1989, based on his own (mistaken) understanding of the time period during which gold coins

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21 As the Second Circuit held in Avelino, "every element needed to prove a crime under Section 1001 is an element of a Section 542 offense." 967 F.2d at 817. See also United States v. Rose, 570 F.2d 1358, 1363-64 (9th Cir. 1978) (same).

were minted by the United States. (Id. at 29-43, 52, 65-73). Mr. Baker filed this form with the United States Customs on his own without his customers' participation. (Id.).

As Mr. Baker described, he created this form for the purpose of invoking a United States Customs' regulation that waives the merchandise processing fee if a receipt is filed for any U.S. goods imported from abroad. (Id. at 66-68). Since no actual receipts exist for United States gold coins, he created the one-page form at issue to serve as such a receipt for when customers imported gold coins minted in the United States. (Id.at 31). At the government's request, Mr. Baker even produced copies of identical forms that he had filed with the United States Customs on behalf of other Jet Air customers who imported gold coins. (Id. at 87-89.)

Mr. Baker then explained that the only information he obtained from Mr. Fenton and his colleague, Mr. Brown, regarding the coins that they were importing was the country of origin, the metal, the quantity and the approximate value or purchase price of the coins. (Id. at 74-76). Mr. Baker testified that United States Customs does not require any additional information to be provided. (Id.). Since Mr. Baker was not required to provide the dates of the coins to be imported by Mr. Fenton to the United States Customs. Mr. Baker did not obtain this information. (Id. at 79-80). As a result, Mr. Baker testified that he did not know the dates of the coins that Mr. Fenton was importing. (Id.). Mr. Fenton also testified, and stated in his declaration, that he was never asked to supply the dates of any coins he was importing by Jet Air. (Fenton Dep. at 197; Fenton Decl. at ¶¶ 3 - 4). In addition, Mr. Fenton also testified, stated in his declaration and produced documents showing that he supplied Mr. Baker with a list of the coins he was importing that did not include their dates. (Fenton Dep. at 199-200; see also Baker Dep. Exh. 4, attached as Exh. HH to the Berke Decl.). In these documents, Messrs. Brown and

Fenton indicated that they would be bringing into the United States 72 gold and 3 silver coins from the United States, and 22 gold and 6 silver coins from the United Kingdom. (See Fenton Decl., Exh. 6). Since Mr. Baker had no knowledge whatsoever that a date contained in the boilerplate form he used was incorrect, his submission of that document cannot support the government's § 542 claim.

Mr. Baker also made clear that Mr. Fenton did not know that he filed the boilerplate U.S. merchandise form at issue. In addition, Mr. Fenton testified, and stated in his declaration, that he had not seen the boilerplate form that Jet Air filed with United States Customs to avoid a merchandise fee until after his arrest, nor was he aware of Mr. Baker's use of such a form. (See Fenton Dep. at 193; Fenton Decl. ¶ 6). Since Mr. Fenton did not authorize Mr. Baker's use of the general U.S. merchandise form, Mr. Fenton's conduct cannot, in any way, provide a basis for the government's § 542 claim.

It is obvious that the government included this claim because it did not bother to determine the significance of the U.S. merchandise form prior to filing its forfeiture complaint. In fact, Mr. Baker testified that no representative of the government ever interviewed him regarding the document at issue prior to relying on the document in making the false statement claim against Mr. Fenton. (See Baker Dep. at 83-84). The government's failure to dismiss this claim when it learned during Mr. Baker's testimony over three years ago that the challenged document was a boilerplate form used by Jet Air wholly unrelated to the importation of Mr. Fenton's 1933 Double Eagle is difficult to comprehend and cannot be justified by any good faith argument.

Without question, in light of the uncontroverted testimony of Mr. Baker and Mr. Fenton, the government cannot show that Mr. Fenton, Knightsbridge Coins, Jet Air or Mr. Baker knowingly made a false statement to facilitate the importation of his 1933 Double Eagle as required to satisfy the knowledge requirement of § 542. As a result, summary judgment must be granted dismissing this claim.

B. The Government Must Also Prove That the False Statement Was Material

Even putting aside the government's inability to prove that Mr. Fenton had the specific intent to make a false statement, it is well-established in this Circuit that the government is also required under § 542 to demonstrate that the allegedly false statement was material. See United States v. Avelino, 967 F.2d 815, 816 (2d Cir. 1992). As recently held by the Second Circuit, the appropriate test is whether the false statement "would have the natural tendency to influence customs officials." United States v. An Antique Platter of Gold, 184 F.3d 131, 135 (2d Cir. 1999), cert. denied, 68 U.S.L.W. 3274 (Jan. 24, 2000).[22] Stated otherwise, the standard is whether "a reasonable customs official would consider the statements to be significant to the exercise of his or her official duties." Id.

Mr. Baker testified that the dates of coins being imported are not even required to be provided on any customs form, and that that he created the boilerplate form at issue for the sole purpose of waiving the merchandise fee. In fact, Mr. Fenton produced documents reflecting

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22 There is a circuit split with respect to the appropriate test to determine whether an allegedly false statement is material under § 542. Both the Fifth and Ninth Circuits have adopted a "but for" test-- i.e., "that but for the false statement the merchandise would not have been allowed to cross United States borders." United States v. Corcuera-Valor, 910 F.2d 198, 199 (5th Cir. 1990). See also United States v. Teraoka, 669 F.2d 577 (9th Cir. 1982).

his prior importation of coins into the United States through Jet Air that clearly show he had not previously provided the dates of any coins that he imported into the United States. (See Fenton Decl., Exh. A). As such, the government can hardly show that the misstated date range on the merchandise fee document in question -- "between 1830 and 1932" instead of "between 1830 and 1933," would have the natural tendency to influence customs officials as required under § 542.

In An Antique Platter of Gold, 184 F.3d at 136, the Second Circuit determined that a knowing misstatement regarding the country of origin of an antique platter was material because (i) the country of origin was information that was required to be provided and (2) there exists a specific customs directive requiring customs officials to determine whether the property was subject to a claim of foreign ownership and to seize that property. Id. at 136. Obviously, to determine whether an antiquity is subject to such a claim of foreign ownership, the customs official needed to know the country of origin to ascertain which laws apply. Id. By contrast, in the instant case, the United States Customs Service did not require on any form or otherwise for Mr. Fenton or Jet Air to provide the dates of the coins being imported -- only the country of origin, the metal, the quantity and the value of the coins. As a result, Jet Air's use of a boilerplate form to avoid the merchandise fee that was incorrect both generally and with regard to one of the coins being imported, the 1933 Double Eagle, was not material since the dates of coins being imported was not information relevant to the customs process.

Accordingly, there is no material fact at issue supporting the government's claim that Mr. Fenton or Knightsbridge Coins made or caused to be made a false and material statement knowing the statement to be false in violation of § 542.

CONCLUSION

Summary judgment should be granted dismissing the third amended complaint. No facts support the government's forfeiture claims seeking to divest Mr. Fenton of his 1933 Double Eagle. As a result, the drastic remedy of forfeiture may not be pursued and the coin should be returned to Mr. Fenton.

Dated: New York, New York
February 1, 2000

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Of Counsel:
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CERTIFICATE OF SERVICE

I hereby certify that Claimant Stephen C. Fenton's Motion for Summary Judgment, dated February 1, 2000, and accompanying declarations, exhibits, Statement pursuant to Local Rule 56.1 and supporting Memorandum of Law, was caused to be served in accordance with Rule 5, Federal Rules of Civil Procedure, on the 1st day of February, 2000, by sending a true copy to the following by hand:

Jane A. Levine, Esq.
Assistant United States Attorney
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

Dated: New York, New York
February 1, 2000

Marc D. Merriweather (MDM-2650)

CERTIFICATE OF SERVICE

I hereby certify that Claimant Stephen C. Fenton's redacted Motion for Summary Judgment, dated February 1, 2000, and accompanying declarations, exhibits, Statement pursuant to Local Rule 56.1 and supporting Memorandum of Law, was caused to be served in accordance with Rule 5, Federal Rules of Civil Procedure, on the 25th day of February, 2000, by sending a true copy to the following by hand:

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Dated: New York, New York
February 25, 2000

Marc D. Merriweather (MDM-2650)